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No. 95-191

IN THE
Supreme Court of the United States

OCTOBER TERM, 1995

O'HARE TRUCK SERVICE, INC.
AND JOHN A. GRATZIANNA,
Petitioners,
v.

CITY OF NORTHLAKE, MAYOR REID PAXSON,
AND POLICE CHIEF SEYMOUR SAPOZNIK,
Respondents.

BRIEF OF ILLINOIS STATE OFFICIALS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

The question presented in this case is whether this Court's decisions in *Elrod v. Burns*, 427 U.S. 347 (1976), *Branti v. Finkel*, 445 U.S. 507 (1980), and *Rutan v. Republican Party*, 497 U.S. 62 (1990), should be extended to prohibit public officials from considering political affiliation and support in the selection of contractors who seek to do business with the government. The individuals upon whose behalf this brief is submitted are named defendants in two cases currently pending in the Seventh Circuit, *Tarpley v. Jeffers*, No. 93-4092 (S.D. Ill.), *appeal pending*, No. 95-2084 (7th Cir.), and *Vickery v. Jones*, No. 93 CV 4030 (S.D. Ill.), *appeal pending*, Nos. 96-1055 & 96-

1163 (7th Cir.), which seek to expand the Court's prior ruling in *Rutan* to cover temporary employees.[1] With the consent of the parties, the State Officials offer this brief as amicus curiae in accordance with Supreme Court Rule 37.3.

In 1990, this Court held that under the First Amendment, hiring, promotion, transfer and recall decisions involving public offices for which party affiliation is not an "appropriate requirement" may not be based on political affiliation and support. *Rutan*, 497 U.S. at 65. In response to this Court's decision in *Rutan*, former Governor James R. Thompson and Governor Jim Edgar (who took office January 14, 1991) issued a series of executive and administrative orders in an attempt to ensure that the multitude of personnel decisions made daily by state agencies, boards and commissions under the jurisdiction of the Governor were not based on political affiliation and support. At a cost of several hundreds of thousands of dollars, Governor Edgar also implemented the recommendations of the national accounting firm of Ernst & Young to enhance and document the objective elements of the State's personnel system, including the use of a standardized interview, evaluation and selection process to identify and rank qualified candidates without regard to political considerations.

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[1] The defendants in the *Tarpley* action include the Governor of Illinois, Jim Edgar, a member of the Governor's staff, Janis Cellini, and five officials in the Illinois Department of Mental Health and Developmental Disabilities -- Shawn Jeffers, Alan Pigg, Alice Kerns, Natalie Bales, and Don Schroyer. The defendants in the *Vickery* action include a member of the Governor's staff, Janell Jones Hilger, the Secretary of the Illinois Department of Transportation, Kirk Brown, and the Department's Bureau Chief of Personnel, William Pearman. This brief is submitted on behalf of all of these individuals, who are referred to collectively hereafter as "the State Officials."

Notwithstanding these measures, since the Court issued its *Rutan* ruling, more than sixty officers and employees of the State have been sued in at least eighteen cases, filed under 42 U.S.C. § 1983, alleging that particular employment decisions resulted in a violation of First Amendment rights. Typically, these cases have involved allegations by existing employees that, notwithstanding the results of the job-related interview and evaluation process, they were more qualified for a promotion than the candidate who was selected but were denied the position on the basis of "politics." The manner in which disappointed applicants and employees have sought to extend the ban on political considerations highlights the practical problems public officials face in interpreting and administering *Elrod*, *Branti*, and *Rutan*.

In both the *Tarpley* and *Vickery* cases, for example, the plaintiffs seek to extend *Rutan* to prohibit state agencies from taking political considerations into account when selecting temporary employees, even though it is undisputed that (1) temporary employees may not fill a particular temporary position for more than six months during any twelve month period, and (2) temporary employees are not eligible to receive any of the benefits associated with permanent employment other than a wage. In both cases, the plaintiffs also have alleged that they were denied particular jobs because of their failure to affiliate with or support the Republican Party. However, in *Vickery*, *supra*, the plaintiff admitted in his deposition that he was himself a long-time member and supporter of the Republican Party. The district court nonetheless held that plaintiff stated a First Amendment claim because "he lost the support of the Republican Party and, allegedly, the possibility of renewal of his [temporary]

contract, when his political sponsor no longer had political clout." *Vickery v. Jones*, 856 F. Supp. 1313, 1329 (S.D. Ill. 1994). Thus, at least one district court has extended *Rutan* to protect employees who share the same political affiliation and beliefs as the party in power.

Like the plaintiffs in *Tarpley* and *Vickery*, Petitioners here seek to extend the ban on political considerations to governmental decisions that are distinguishable from the practices at issue in *Elrod*, *Branti*, and *Rutan*. Petitioners claim that the Mayor of the City of Northlake removed their company from a list of qualified towing companies after Petitioners actively supported the Mayor's electoral opponent. The district court and Seventh Circuit held that the rule underlying this Court's decisions in *Elrod*, *Branti*, and *Rutan* does not extend to the award of public contracts, and dismissed Petitioners' complaint for failure to state a claim.

The State Officials have an interest in this case for two principal reasons. *First*, as noted above, the Edgar Administration has invested substantial time, money and effort in implementing a personnel system which complies with the Court's decision in *Rutan*. Nonetheless, state employees have been required to defend numerous lawsuits challenging particular personnel decisions which attempt to expand the reach of that decision and exploit the ambiguities and uncertainties in the applicable legal rules.

Second, each year agencies under the jurisdiction of the Governor enter into thousands of contracts for products and services, ranging from multi-million dollar contracts with large corporations for highway repair to inexpensive contracts for professional services with smaller firms. The vast majority of Illinois contracts are awarded either to the lowest bidder or pursuant to an apolitical competitive selection

procedure under the Illinois Purchasing Act. *See* 30 ILCS 505/1 *et seq*. Most of these contracts are awarded to the "lowest responsible bidder." Others, such as the competitive selection of engineer design consultants for road construction, involve a qualitative assessment of the skills necessary to perform the contracts. However, a number of contracts, *e.g.*, for repairs, maintenance or the purchase of commodities or equipment of less than $25,000, are not subject to the competitive selection requirements of the Purchasing Act. It is safe to assume that a significant number of the businesses which receive public contracts have contributed money or support to the campaigns of elected officials or to one (if not both) of the political parties. If the *Elrod*, *Branti*, and *Rutan* decisions are extended to cover public contracts, public officials may face the risk of a Section 1983 claim whenever a public contract is awarded (other than by low bid) to a firm that has provided political or financial support in the past. In addition to inspiring a new wave of litigation, the extension sought by Petitioners here will lead to the absurd result that public officials may best shield themselves from the threat of litigation by awarding contracts to supporters of their political opponents.

To resolve the question presented in this case, this Court should review the soundness of the constitutional rule which underlies *Elrod*, *Branti*, and *Rutan*, as well as how that rule has worked in practice. For the reasons set forth below, the judgment of the Seventh Circuit should be affirmed because *Rutan* should be overruled. Overruling this Court's 1990 ruling in *Rutan* provides an independent basis for affirming the Seventh Circuit's judgment, even though the Respondents did not raise this argument below. *See Mapp v. Ohio*, 367 U.S. 643, 646 n.3 (1961) (citing amicus curiae

brief in reversing prior decision that the exclusionary rule did not apply to the states). Alternatively, the State Officials' experience since the *Rutan* decision militates strongly against extending that decision to provide for a claim based on the award of public contracts, like Petitioners' claim in this case.

STATEMENT OF THE CASE

The State Officials adopt Petitioners' Statement of the Case.

SUMMARY OF ARGUMENT

Elected officials have considered political loyalty and party affiliation in government employment since the administration of George Washington in 1789. Over two hundred years later in 1990, this Court held in *Rutan* that these practices had a significant "chilling effect" on First Amendment freedoms, which outweighed the states' interests in encouraging efficient and effective governmental operations and participation in the political process.

Now, this case raises the question of whether the First Amendment prohibits the use of political considerations in the award of public contracts. The Seventh Circuit declined to extend the reach of *Elrod*, *Branti*, and *Rutan* to include the award of public contracts, on the ground that this Court never has extended the ban on political considerations beyond government employees. While that analysis was correct, the Seventh Circuit's judgment should be affirmed on the independent ground that *Rutan* should be overruled. The *Rutan* holding is fundamentally flawed because it contradicts history and tradition from the earliest days of the Republic; it is analytically unsound; and, as demonstrated by experience since 1990, it has proved unworkable. These substantial flaws provide ample justification for departing from the

doctrine of stare decisis; therefore, we advocate the position set forth in the dissenting opinion of Justice Scalia in *Rutan*: the rules in *Elrod* and *Branti* should not be extended "beyond their facts, viz., actual discharge of employees for their political affiliation." 497 U.S. at 114.

Alternatively, even if this Court declines to overrule the *Rutan* decision, it should nonetheless affirm the judgment below because the presumption that First Amendment freedoms will be "chilled" if political factors are considered does not apply, or at least is substantially weakened, in the award of public contracts.

ARGUMENT

I.

THIS COURT'S DECISION IN *RUTAN* SHOULD BE OVERRULED BECAUSE IT IS UNSOUND IN PRINCIPLE, UNWORKABLE IN PRACTICE, AND HAS NOT ENGENDERED THE TYPE OF RELIANCE WHICH JUSTIFIES ADHERENCE TO THE DOCTRINE OF STARE DECISIS.

Effective government requires that elected officials be permitted to employ accountable, trusted employees not only to help make policy but to implement it. Decisions as to when to consider political affiliation or belief should not be continually subjected to second guessing based on ill-defined principles that are erratically interpreted.

Federal courts, which have no role in or responsibility for the effective performance of the executive branches of government, are ill-equipped to determine when political affiliation or belief is an appropriate job criterion. Individual judges have different views on that subject, as is evidenced by the plethora of decisions reaching diametrically opposite

conclusions. Government officials make hiring and contracting decisions on a daily basis which may lead to lawsuits seeking damage awards against them personally or against the government at taxpayer expense.

Consideration of political affiliation or support in governmental hiring and contracting decisions has existed in this country for over 200 years, from Presidents Washington and Jefferson to the present. During that time, judgments as to when political affiliation or belief should be considered in hiring have been made in the political arena by elected officials. The excesses of Tammany Hall and the like long ago were eliminated without judicial intervention; at least forty-three states, including Illinois, have some form of civil service code or merit system affording protection to the vast majority of state governmental employees. Illinois, like other states, also has a purchasing act which requires that the large majority of contracts must be awarded either to the lowest bidder or pursuant to a competitive selection procedure.

Notwithstanding this history and tradition, a sharply divided Court held for the first time in 1976 that the First Amendment limits the ability of elected officials to consider political beliefs in the employment process. *Elrod*, 427 U.S. at 375 (Stewart J., concurring). The decision in *Elrod* marked a significant departure from the understanding and practice of the Founding Fathers who enacted the First Amendment. As a result, each time the Court has considered, and expanded, the ban on politics in public employment, members of this Court have vigorously opposed the Court's intrusion into the field. *E.g.*, *Elrod*, 427 U.S. at 375 (Burger, C.J., dissenting); *id.* at 376 (Powell, J., dissenting); *Branti*, 445 U.S. at 521 (Powell, J., dissenting). In *Rutan*, the four dissenting members of this Court argued

that *Elrod* and *Branti* should be overruled (497 U.S. at 110-11; Scalia, J., dissenting):

> "Even in the field of constitutional adjudication, where the pull of *stare decisis* is at its weakest, *see Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962) (opinion of Harlan, J.), one is reluctant to depart from precedent. But when that precedent is not only wrong, not only recent, not only contradicted by a long prior tradition, but also has proved unworkable in practice, then all reluctance ought to disappear. In my view that is the situation here."

In the alternative, the dissenters in *Rutan* argued that even if *Elrod* and *Branti* were correctly decided, those decisions "should not be extended beyond their facts, viz., actual discharge of employees for their political affiliation." *Id.* at 114 (Scalia, J., dissenting). Addressing the burdens allegedly imposed on applicants and employees who fail to obtain a desired job, transfer or promotion, the dissent reasoned that "[t]he loss of one's current livelihood is an appreciably greater constraint than such other disappointments as the failure to obtain a promotion . . . . Even if the 'coercive' effect of the former has been held always to outweigh the benefits of party-based employment decisions, the 'coercive' effect of the latter should not be." *Id.*

The dissenters in *Rutan* also rejected the Seventh Circuit's proposed standard, which extended *Elrod* to provide for a cause of action "if the employee can demonstrate that he was subjected to the 'substantial equivalent of dismissal.'" *Id.* The dissenters opted for a more limited and certain standard (*id.*): "If *Elrod* and *Branti* are not to be

reconsidered in light of their demonstrably unsatisfactory consequences, I would go no further than to allow a cause of action when the employee has lost his position, that is, his formal title and salary."

There is no indication that the dissenting Justices in *Rutan* have retreated from their view that *Elrod* and *Branti* should be overruled, or, at the very least, limited to their facts. In addition, decisions since *Rutan* suggest that the Court may properly return to a methodology of constitutional interpretation which looks to history and the understanding of the Framers to apprehend the meaning of the Bill of Rights. *See, e.g., McIntyre v. Ohio Elections Commission*, 115 S. Ct. 1511, 1525 (1995) (Thomas, J., concurring); *id.* at 1531 (Scalia, J., dissenting). Given that there is nothing in the language of the First Amendment that bans political considerations in public employment, and given that *the Framers* openly considered politics in making their own appointments, it appears that if the issue were presented for the first time, this Court likely would hold that the Constitution does not prevent elected officials from selecting employees or awarding contracts on the basis of political affiliation and belief.

The question therefore arises whether, under the circumstances, "the pull of stare decisis" is sufficient to reaffirm a holding which is unsound and unworkable, or whether the Court should abandon the constitutional rule underlying *Rutan*. In *Helvering v. Hallock*, 309 U.S. 106, 119 (1940), Justice Frankfurter admonished that "stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically

sounder, and verified by experience." More recently, this Court has identified three principal factors which inform the Court's determination whether to reaffirm or overrule a prior decision: (1) whether the decision being challenged is sound in principle; (2) whether the prior decision has proved workable in practice; and (3) whether the prior decision is likely to have engendered substantial reliance. *Allied-Signal, Inc. v. Director, Division of Taxation*, 504 U.S. 768, 783 (1992). *See also Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2114-17 (1995); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854-69 (1992). As we demonstrate below, each of these factors compels a departure from the doctrine of stare decisis in this case.

A. *Rutan* Was Incorrectly Decided.

The Court's decision in *Rutan* is unsound for three independent reasons. *First*, the constitutional rule underlying *Rutan* contradicts the practice of the Founding Fathers and over 200 years of history and tradition. *Second*, the Court's decision exaggerated the burdens which political considerations impose on the First Amendment rights of affected applicants and employees, and it underestimated the contributions such considerations make to the competing interests at stake. *Third*, the Court's ruling was premised on judgments about our political system which should be left to the people's elected representatives.

1. The constitutional rule which underlies *Rutan* ignored 200 years of history and tradition.

This Court traditionally has looked to history and the intention of the Framers in construing the broad principles

which animate our Constitution. *See, e.g., Lynch v. Donnelly*, 465 U.S. 668, 673 (1984); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 294-95 (1963) (Brennan, J., concurring); *South Carolina v. United States*, 199 U.S. 437, 448 (1905). As Justice Thomas observed in his concurrence in *McIntyre*, 115 S. Ct. at 1525 (citation omitted), "'[t]he Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now.'" Justice Thomas continued (*id.*, citations omitted):

> "We should seek the original understanding when we interpret the Speech and Press Clauses, just as we do when we read the Religion Clauses of the First Amendment. When the Framers did not discuss the precise question at issue, we have turned to 'what history reveals was the contemporaneous understanding of [the Establishment Clause's] guarantees.' '[T]he line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers.'"

The First Amendment is silent as to whether political factors may be considered in selecting public employees. This Court did not address the constitutionality of such considerations in any form until 1976. That is not surprising, however, because political patronage is by all accounts "as old as the Republic." *Elrod*, 427 U.S. at 376 (Powell, J., dissenting). *See also id.* at 353 (Brennan, J., plurality) ("Patronage practice is not new to American politics. It has existed at the federal level at least since the Presidency of

Thomas Jefferson"); *Rutan*, 497 U.S. at 81 (tradition of patronage "dates back to the beginning of the Republic").

We know, for example, that President Washington "tended to confine appointments even of customs officials and postmasters to Federalists, as opposed to anti-Federalists." *Elrod*, 427 U.S. at 378 (Powell, J., dissenting). We also know that Thomas Jefferson, the first President to succeed a leader of the opposing party, "made significant patronage use of the appointment and removal powers." *Id.* And, while the *Elrod* plurality credited Andrew Jackson with the "popularization and legitimation" of patronage, *id.* at 353, patronage also was "practiced widely in the States, especially in New York and Pennsylvania." *Id.* at 378 (Powell, J., dissenting). *See also* George J. Gordon, PUBLIC ADMINISTRATION IN AMERICA 310 (3d ed. 1986) (patronage developed during the 1820's in the state and local governments of many newly admitted states, fostering loyal party organizations).

The limitation on considering political affiliation in public employment which the Court imposed in 1976, and dramatically expanded in 1990 in *Rutan*, improperly ignored two hundred years of contrary tradition. In light of the understanding and practice of the Founding Fathers, the foundation for the Court's decision in *Rutan* is unsound.

2. *Rutan* incorrectly balanced the competing interests at stake.

At the outset, it is unclear what standard the Court will apply to balance the competing interests at stake in this case. In *Elrod*, the plurality asserted that because considering political factors "severely restrict[s]" political belief and association (427 U.S. at 347), it must survive "exacting

scrutiny," *i.e.*, the government bears the burden of advancing an interest of "vital importance." *Id.* at 362. In *Rutan*, the majority adopted the *Elrod* framework without questioning whether strict scrutiny applied. *See* 497 U.S. at 74. The dissent, however, found that the "strict-scrutiny standard finds no support in our cases," *id.* at 98; instead, "'[a] governmental employer may subject its employees to such special restrictions on free expression as are reasonably necessary to promote effective government.'" *Id.* (quoting *Brown v. Glines*, 444 U.S. 348, 356 n.13 (1980)). More recently, members of this Court have recognized that the government is entitled to greater deference where, as here, it is acting as employer, rather than as sovereign. *See United States v. Nat'l Treasury Employees Union*, 115 S. Ct. 1003, 1017 n.21 (1995); *Waters v. Churchill*, 114 S. Ct. 1878, 1886 (1994) (O'Connor, J., plurality). Consequently, it is not clear that this Court will apply strict scrutiny to the allegations in Petitioners' complaint.

Even if the Court applies strict scrutiny, however, *Rutan* incorrectly balanced the competing interests at stake by exaggerating the presumed burdens on First Amendment rights and underestimating the strength of the State's interests in encouraging participation in the political process and promoting effective and accountable government.

Rutan came before this Court upon dismissal of the plaintiffs' complaint for failure to state a claim. In the absence of any factual record, the majority opinion presumed that the failure to obtain a desired promotion or transfer, based on political considerations, imposed "significant penalties" on the exercise of First Amendment rights. 497 U.S. at 74. However, the plaintiffs were not singled out or punished by the practices alleged (and assumed to be true) in

the *Rutan* complaint; instead, they simply failed to receive some favorable treatment from their government employer. *Id.* at 114 (Scalia, J., dissenting). In light of this difference, the dissent found that considering political affiliation in hiring, promoting and transferring public employees did not constitute "a significant impairment of free speech or free association." *Id.* at 110.

The majority in *Rutan* also failed to recognize that the consideration of politics in the selection process is just as likely -- if not more likely -- to inspire, rather than chill, the exercise of First Amendment freedoms. Individuals who cannot obtain a desired job, transfer or promotion may be impelled to join the debate, rather than shrink from political life, to advance the electoral fortunes of the party out of power.

Against these limited burdens are the State's compelling interests in promoting (1) participation in the political process, (2) the stability of the two party system, and (3) the efficiency and effectiveness of governmental operations. These interests are discussed at great length in the dissent in *Rutan*, and will not be recounted here. *See Rutan*, 497 U.S. at 103-08 (Scalia, J., dissenting). *See also Branti*, 445 U.S. at 528-33 (Powell, J., dissenting); *Elrod*, 427 U.S. at 380 (Powell, J., dissenting). We note only that subsequent experience has confirmed the dissent's observation that to the extent media and money-intensive techniques have replaced traditional methods of campaigning, "the political system is not clearly better off." *Rutan*, 497 U.S. at 105 (Scalia, J., dissenting). *See, e.g.*, Elizabeth Kolbert, *Forbes's Silver Bullet for the Nation's Malaise*, N.Y. TIMES, Jan. 1, 1996, at 1 (candidate for Republican presidential nomination, Steve Forbes, is rewriting rules of presidential

campaign with private spending on television advertising but no party organization); Steven A. Holmes, *The 1992 Elections: Disappointment -- News Analysis*, N.Y. TIMES, Nov. 5, 1992, at A1 (billionaire independent candidate H. Ross Perot received more than eighteen percent of the popular vote in the 1992 presidential general election, using his own monetary resources).

The Court's decision in *Rutan* was based on the premise that considering political loyalty and belief in the employment process makes a limited contribution to the democratic process while severely encroaching First Amendment freedoms. In fact, the opposite is true; the limited encroachments on First Amendment freedoms are outweighed by important contributions to the political process and effective government.[2]

3. Whether to consider political factors in public employment is a question for the people to decide through their elected representatives.

To overrule its prior decision in *Rutan*, this Court does not have to find that placing political supporters or contractors into government jobs always promotes effective government or that it invariably benefits the political system. Rather, the Court need only conclude that the determination

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[2] In view of the important interests at stake, this case is distinguishable from *Heiser v. Umbehr*, No. 95-1654 (U.S.) (oral argument held November 28, 1995), which involves alleged retaliation for speaking out on matters of public concern. Whereas history and the state's compelling interests in the stability of our democratic system and effective governmental operations justify the consideration of political factors in employment, these interests are neither relevant to nor served by punishment of the speech that is at issue in *Heiser*.

whether politics is relevant to the selection of government employees or contractors is a judgment best left to the representative branches of the federal government, and states, counties, cities and towns across the country. As the dissenters argued in *Rutan* (497 U.S. at 110, emphasis in original):

> "To oppose our *Elrod-Branti* jurisprudence, one need not believe that the patronage system is *necessarily* desirable; nor even that it is always and everywhere *arguably* desirable; but merely that it is a political arrangement that may sometimes be a reasonable choice, and should therefore be left to the judgment of the people's elected representatives."[3]

These political judgments will vary, of course, from time to time and place to place. However, a survey of sister states shows that, in addition to Illinois, *see* 20 ILCS 415/1 *et seq.*, at least forty-two states have adopted some form of civil service system or merit selection principles for the

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[3] *See also Branti*, 445 U.S. at 525-26 (Powell, J., dissenting) ("A constitutional standard that is both uncertain in its application and impervious to legislative change will now control selection and removal of key governmental personnel. Federal judges will now be the final arbiters as to who federal, state and local governments may employ. In my view, the Court is not justified in removing decisions so essential to responsible and efficient governance from the discretion of legislative and executive officials"); *Elrod*, 427 U.S. at 375-76 (Burger, C.J., dissenting) ("the issue is not so much whether the patronage system is 'good' or 'bad,' as the plurality characterizes the problem, but whether the choice of its use in the management of the very government of each State was not, in the words of the Tenth Amendment, 'reserved to the States . . . or to the people.'")

effective administration of government and the protection of public employees.[4]

Judgments about the role which politics should play in public employment are best left to the political process for two principal reasons. *First*, establishing the ideal model for effective and responsible government is a question of political science, not constitutional law. *See* Glen S. Howard, Comment, *Patronage Dismissals: Constitutional Limits and Political Justifications*, 41 U. CHI. L. REV. 297, 323 n.115 (1974) ("It is very difficult to determine objectively which form of governmental organization is the most effective and efficient, in part because it is necessary to make basic

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[4] *See, e.g.*, ALA. CODE § 36-26-1 *et seq.*; ALASKA STAT. § 39.25.010 *et seq.*; ARIZ. REV. STAT. ANN. § 41-761 *et seq.*; CAL. GOV. CODE § 18500 *et seq.*; COLO. REV. STAT. § 24-50-101 *et seq.*; CONN. GEN. STAT. § 5-193 *et seq.*; DEL. CODE ANN. tit. 29, § 5901 *et seq.*; D.C. CODE. ANN. § 1-601.1 *et seq.*; FLA. STAT. ANN. § 110.201 *et seq.*; GA. CODE ANN. § 45-20-1 *et seq.*; HAW. REV. STAT. § 76-1 *et seq.*; IDAHO CODE § 67-5301 *et seq.*; IND. CODE ANN. § 4-15-2-1 *et seq.*; IOWA CODE ANN. § 19A.1 *et seq.*; KAN. STAT. ANN. § 75-2925 *et seq.*; KY. REV. STAT. ANN. § 18A.005 *et seq.*; LA. REV. STAT. ANN. § 721 *et seq.*; ME. REV. STAT. ANN. tit. 5, § 7031 *et seq.*; MD. CODE. ANN., STATE PERS., § 1-101 *et seq.*; MASS. ANN. LAWS ch. 31, § 1 *et seq.*; MINN. STAT. ANN. § 43A.01 *et seq.*; MISS. CODE ANN. § 25-9-101 *et seq.*; MO. ANN. STAT. § 36.010 *et seq.*; NEB. REV. STAT. § 81-1301 *et seq.*; NEV. REV. STAT. ANN. § 284.010 *et seq.*; N.J. STAT. ANN. § 11A:1-1 *et seq.*; N.M. STAT. ANN. § 10-9-1 *et seq.*; N.Y. CIV. SERV. LAW § 1 *et seq.*; N.D. CENT. CODE. § 54-44.3-01 *et seq.*; OHIO REV. CODE ANN. § 124.01 *et seq.*; OKLA. STAT. ANN. tit. 74, § 840-1.1 *et seq.*; OR. REV. STAT. § 240.005 *et seq.*; PA. STAT. ANN. tit. 71, § 741.1 *et seq.*; S.C. CODE ANN. § 8-11-210 *et seq.*; S.D. CODIFIED LAWS ANN. § 3-6A-1 *et seq.*; TENN. CODE ANN. § 8-30-101 *et seq.*; UTAH CODE ANN. § 67-19-1 *et seq.*; VA. CODE ANN. § 2.1-110 *et seq.*; WASH. REV. CODE ANN. § 41.06.010 *et seq.*; W. VA. CODE § 29-6-1 *et seq.*; WIS. STAT. ANN. § 230.01 *et seq.*

assumptions as to what the government should be efficient in doing and to what ends it should be effective."). *Second*, as demonstrated more fully below, federal courts have proved unable to coherently and consistently identify when party affiliation and support are legitimate considerations in the selection of public employees.

B. The Constitutional Rule Which Underlies *Rutan* Has Proved Unworkable.

When this Court reexamines a prior holding, its "judgment is informed by a series of prudential and pragmatic considerations," including whether the rule has proved unworkable. *Planned Parenthood*, 505 U.S. at 854. *See also Allied-Signal*, 504 U.S. at 783 (one relevant consideration is whether the prior decision is "unworkable in practice"), *quoting Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 546 (1985). In this case, the Court's rulings in *Elrod*, *Branti*, and *Rutan* are unworkable in at least four dimensions.

First, four members of the Court already have identified a principal problem with administering and complying with the ban on political considerations in public employment: the determination of who may be hired or promoted on the basis of political affiliation and belief. In recognition of the governmental interests which support the consideration of political factors, including but not limited to promoting accountability to the electorate, this Court has recognized that many employment decisions properly *are* based on political considerations. *See, e.g., Elrod*, 427 U.S. at 367-68. The problem, however, is that the line between permissible and impermissible political considerations has been extremely difficult to discern, causing confusion in the lower courts and confounding public officials who must

attempt to identify those positions which may be filled with their political supporters.

In *Branti*, 445 U.S. at 518, the Court held that "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." As the dissenters noted in *Rutan*, "[w]hat that means is anybody's guess." *Rutan*, 497 U.S. at 111-12 (Scalia, J., dissenting) (citing sixteen lower court cases applying the *Branti* standard with inconsistent and irreconcilable results). Since *Rutan*, the lower courts have continued to struggle with the standard for identifying those positions which may be filled on the basis of party affiliation and belief. Not surprisingly, the result is a hodge-podge of inconsistent rulings, with the results governed most by the number of the federal circuit in which the claim was brought.[5] The uncertainty and confusion is

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[5] For example, some courts have held that the position of deputy sheriff is not one for which political affiliation is an appropriate consideration. *See, e.g., Brady v. Fort Bend County*, 58 F.3d 173, 174 (5th Cir. 1995) (recognizing conflicting decisions); *Vojvodich v. Lopez*, 48 F.3d 879, 886 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 169 (1995); *Stough v. Gallagher*, 967 F.2d 1523, 1529 (11th Cir. 1992), *rehearing denied*, 978 F.2d 718 (11th Cir. 1992). Other courts have reached the opposite conclusion. *See, e.g., Upton v. Thompson*, 930 F.2d 1209, 1218 (7th Cir. 1991) ("the indefiniteness of the applicable *Branti* standard has resulted in judicial confusion and inconsistency"), *cert. denied, Thulen v. Bausman*, 503 U.S. 906 (1992). The courts have had a similar problem with the position of highway superintendent. *Compare Vezzetti v. Pellegrini*, 22 F.3d 483, 486 (2nd Cir. 1994) (political affiliation properly considered); *Selch v. Letts*, 5 F.3d 1040, 1047 (7th Cir. 1993) (same), *cert. denied*, 114 S. Ct. 1189 (1994) *with Akers v. Caperton*, 998 F.2d 220, 225 (4th Cir. 1993) (continued...)

inevitable because the determination of whether and when political affiliation and support is an appropriate requirement for the effective performance of the public office involved is a political judgment that "exceed[s] judicial competence to answer." *LaFalce v. Houston*, 712 F.2d 292, 294 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984).

Second, there are significant problems in divining the meaning of political "affiliation and support." Does the term include personal differences among members of the same party, or subtle intra-party differences in policy beliefs? In the *Vickery* case, discussed *supra* at 3-4, the plaintiff contends that although he was a member and supporter of the incumbent Republican party, he did not receive a temporary position because he was not a "strong enough" supporter. The district court upheld the plaintiff's First Amendment claim without any evidence that the employment decision interfered with or even affected the plaintiff's political beliefs or affiliation, reasoning that "it does not matter that the plaintiff admits that he is a Republican." *Vickery*, 856 F. Supp. at 1329. As a result, it appears that a plaintiff can state a valid federal constitutional claim based on his or her personal disagreement with some party members. Giving plaintiffs this kind of claim does not address the supposed evil of political patronage; *i.e.*, it is not responsive to any real fear that plaintiffs will be "coerced" into sacrificing their true political beliefs in order to obtain a desired contract or advance in their careers.

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[5] (...continued)
(political affiliation *not* properly considered). The differences among the circuits on certain positions, of course, does not reflect the true depth of the uncertainty problem. Government officials must struggle daily to apply the standard to positions in the absence of any judicial guidance.

There are other aspects to this problem. It is not clear whether the political "affiliation and support" at issue must be that of the plaintiff. In another pending case filed against officials of the State of Illinois, *Peek v. Jason*, No. 94-3027 (C.D. Ill.), the plaintiff seeks to extend the ban on political considerations to include personal or familial ties. In *Peek*, an employee contends that she was denied a promotion in violation of the First Amendment because the candidate who was selected is the daughter of a Republican Party official. This case raises the question whether a public employer may run afoul of *Rutan*, or at least be forced to go to trial, *see Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), whenever the public agency selects an employee who happens to have a personal or familial relationship with a political figure. If the political activities and beliefs of a relative, friend or supporter are enough to justify a constitutional claim, the universe of claims and claimants will grow exponentially even in the absence of *any* chilling effect on First Amendment freedoms.

Similarly, it is often difficult to determine when the prohibited "support" is "political" rather than personal. A personnel recommendation may come from a legislator or an official of a political party, but the recommendation may nonetheless be based on friendship or a favorable assessment of the candidate's character, skills and experience.

To illustrate the point, let us consider application of the *Rutan* holding to a case where a civil servant is about to hire a correctional officer. The civil servant has narrowed the field of applicants to the two most qualified candidates for the job. Candidate No. 1, who is slightly more qualified for the position, has received a letter of recommendation from his local state representative attesting to the candidate's

diligence, skill and experience. Candidate No. 2 has no recommendations from any elected officials.

In this hypothetical case, the career civil servant has a choice: he can hire the better qualified candidate, and risk a lawsuit against his personal assets, or he can hire the slightly less qualified candidate and avoid that risk. We suggest that many career civil servants would (and do) choose the latter option. The net practical effect is that *Rutan* has not encouraged the exercise of First Amendment rights in the political process; it has effectively punished at least some individuals who exercise those rights.

Third, there is no meaningful method of determining which public economic relationships are embraced by the ban on considering political factors. *Rutan* involved the hiring, promotion, transfer and recall of career employees. In the *Tarpley* and *Vickery* cases, the district courts extended the limit on "political considerations" to include temporary employees, who do not receive any employment benefits other than a wage and who may hold a position for as short as one day but in no event longer than six months in any twelve month period. 20 ILCS 415/8b.9. *See Tarpley v. Jeffers*, No. 93 CV 4092 JPG, Mem. & Ord. at 6-7 (S.D. Ill. Apr. 6, 1995); *Vickery*, 856 F. Supp. at 1325 (prohibiting the selection of temporary employees on the basis of political affiliation and support "regardless of the length of time the individual will serve"). The plaintiffs in *Tarpley* and *Vickery* seek not only to extend the *Rutan* holding to cover temporary jobs, they also request that, in making seasonal appointments, state officials be prohibited from considering the *experience or actual job performance* of employees who had been appointed to temporary positions in the past on the basis of

political affiliation. *See, e.g., Vickery v. Jones*, No. 93 CV 4030, Mem. & Ord., at 2 (S.D. Ill. Sept. 15, 1994).

Petitioners in this case assert that they will be chilled in the exercise of their First Amendment rights if they are not on the list of qualified firms which may be hired by the city to provide towing services. Petitioners did not have a firm contract to provide specific services at a set price; instead, they allege only that they were on a rotation list of firms that are called if and when the need arises. (Appendix to Petition for a Writ of Certiorari 22a-24a.) The differences between the nature of Petitioners' economic interest and that of the plaintiffs in *Elrod* is significant.

In general, the nature of economic relationships between government and its constituents varies widely: temporary employees, emergency workers, summer interns, and volunteers all provide services to public entities. At some point, however, the nature and importance of the economic relationship with the government must become so slight that there is no meaningful chance of coercion. Yet, at least one court of appeals has held that even the loss of a *volunteer* position may be actionable under the First Amendment. *See Hyland v. Wonder*, 972 F.2d 1129, 1135-36 (9th Cir. 1992). This aspect of *Rutan* also is unworkable.

Fourth, there is no principled way to determine when an adverse act has sufficient potential to chill First Amendment activity. *Rutan* was premised upon the Court's determination that the employment practices alleged in that case significantly burdened First Amendment freedoms. Yet, the majority appeared to suggest that even "trivial" matters may give rise to a constitutional claim. *Rutan*, 497 U.S. at 76 n.8. This raises the question whether other incidents of employment, like shift assignment, official location, nature

of a position's duties, or even radio privileges, can make out a First Amendment claim. Would a public employee ever really change his political affiliation in order to be able to play a radio on the job?

At bottom, the constitutional rule underlying the Court's decision in *Rutan* has raised more questions than it answered. The inherent ambiguities in *Rutan* and related decisions impose expensive burdens on state and local officials charged with administering the personnel systems affecting millions of employees. The uncertainties breed inefficiency and injustice when they hamper effective governmental operations, hold public officials accountable if they mistakenly interpret these rules, or create false expectations in public employees. The confusion results in a multitude of federal lawsuits over the fine points of the Court's rules which do not bear on the actual First Amendment interests at stake.

The rule implicated in *Rutan* does not simply need additional "fine-tuning" by the courts. "This uncertainty and confusion are not the result of the fact that *Elrod*, and then *Branti*, chose the wrong 'line' . . . there is no right line -- or at least no right line that can be nationally applied and that is known by judges." *Rutan*, 497 U.S. at 113 (Scalia, J., dissenting). In short, the definitional problems with *Rutan* support a retreat from the Court's attempt to regulate politics in public life through a questionable interpretation of the First Amendment. Overruling *Rutan* will leave public officials and employees with a narrow and clear rule, which limits constitutional claims to those cases involving "actual discharge of employees for their political affiliation." *Id.* at 114 (Scalia, J., dissenting).

C. The Court's Interpretation of the First Amendment Has Not Engendered Reliance So As To Justify Adherence To The Doctrine Of Stare Decisis.

Given the unsound and unworkable nature of *Rutan*, stare decisis should not suffice to uphold that decision unless it has engendered "a kind of reliance that would lend a special hardship to the consequences of overruling [it] and add inequity to the cost of repudiation." *Planned Parenthood*, 505 U.S. at 854. This consideration does not apply here, because *Rutan*, like *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), is a recent decision which has not become part of the constitutional "fabric." *Adarand*, 115 S. Ct. at 2116. Indeed, *Rutan* has been cited only twice by this Court, and never for the rule it announced. *See Payne v. Tennessee*, 501 U.S. 808, 852 n.2 (1991) (Marshall, J., dissenting); *United States v. Kokinda*, 497 U.S. 720, 747 n.4 (1990) (Brennan, J., dissenting).

Overruling *Rutan* will not cause "special hardship" or "inequity" for an additional reason: elected officials in states, cities and counties across the country will remain free to limit (or even prohibit) the consideration of politics in the selection of public employees. In Illinois, for example, more than 85% of the 73,710 employees under the jurisdiction of the Governor hold civil service positions which are governed by the merit and fitness provisions of the Illinois Personnel Code and the accompanying rules promulgated by the Civil Service Commission. *See* 20 ILCS 415/1 *et seq.*; ILL. ADMIN. CODE tit. 80 Ch. I, § 302.10 *et seq*. (The majority of other positions, such as engineers at the Illinois Department of Transportation, are included in a technical pay plan and enjoy job protection roughly equivalent to the

employees covered by the Personnel Code.) The civil service system in Illinois not only limits the ability of state agencies to fire employees; it also provides that the State may not discriminate against applicants for any "non-merit factor." ILL. ADMIN. CODE tit. 80, Ch. I, § 302.790(a).

In contrast to *Planned Parenthood*, aspiring and existing public employees have not relied to any substantial degree on the rule of *Rutan*. To the extent that employees need protection from excessive politicization or arbitrary personnel practices, their recourse is (and for many years has been) the political process, *i.e.*, the laws, rules and regulations which their elected representatives have enacted to best manage government personnel and to promote effective and efficient governmental operations.

II.

THE COURT SHOULD NOT EXTEND THE REACH OF *RUTAN* TO GOVERN THE AWARD OF PUBLIC CONTRACTS.

The Court should not extend the limit on political considerations to the award of public contracts for three reasons. *First*, even if the Court determines that the "pull" of stare decisis -- involving considerations unrelated to the wisdom or efficacy of *Rutan* itself -- is strong enough to counsel against outright rejection of that decision, the Court is not required to propagate unsound doctrine. In this case, Petitioners are asking the Court to do more than *adhere* to its prior holding. Petitioners ask the Court to *extend* the limits of the ban on considering political factors to a completely different economic relationship. No party contends that this Court has actually spoken before to the question presented by this case -- whether a business which

supported an elected official's political opponent states a First Amendment claim when the business fails to receive a public contract from the official it opposed. Nothing in the doctrine of stare decisis requires the Court to extend or strengthen a doctrine which is unsound. As the Court observed in another context, the Court should not "extrapolate an already extended line when, although the general nature of the principle sought to be applied is clear, its precise limits and their ramifications become less so." *Scott v. Illinois*, 440 U.S. 367, 372 (1979).

Second, the constitutional rule at issue cannot be meaningfully applied to entities comprised of multiple individuals. As we demonstrated above, it is difficult enough to figure out what the prohibition of "political affiliation and support" means in the case of individual applicants or employees. (*See supra* at 21-23.) Petitioners ask this Court to apply the same rule to legal entities or associations of more than one individual. Most entities organized for profit, however, do not have an easily identifiable political affiliation or belief. *See LaFalce*, 712 F.2d at 294. These entities run the gamut. At one end is a case like Petitioners': a small company owned by a single individual. Somewhere in the middle is a corporate entity with several owners and numerous employees; and, at the other end, is a large national corporation with dozens of top officers, hundreds if not thousands of owners, and thousands of employees. In such cases, it is difficult to discern a "prevailing" political affiliation. The Court should decline to extend the ban on political considerations to the award of public contracts because it is extremely difficult (if not impossible) to coherently determine the "political affiliation" of entities consisting of more than one individual.

Third, whatever the wisdom of shielding public employees from political considerations, the Court should decline to extend this rule to the award of public contracts because "there are enough differences in the strength of the competing interests in the two classes of cases not to attempt to do so." *LaFalce*, 712 F.2d at 295. In *Rutan*, the Court focused on the "coercive effect" that considering political factors would likely have on a typical applicant or employee. The Court's determination rested on three principal assumptions about a typical "employee": (1) that the government position was the employee's primary source of income; (2) that the employee would be unable to find equivalent work in the private sector; and (3) that the employee would actually be coerced into forfeiting his true political beliefs instead of becoming more politically involved. *See Rutan*, 497 U.S. at 72-74.

Even assuming, arguendo, that a per se rule is appropriate for employees, the same assumptions underlying the rule cannot be made about businesses which compete for public contracts. Bidders on public contracts come in all shapes and sizes; they are too heterogeneous to apply the same presumptions which supported a per se rule for employees. For example, contractors are far more likely to obtain income in the private sector. *LaFalce*, 712 F.2d at 294. They are more likely to have sufficient capital at their disposal so that the loss of a particular contract does not cause economic hardship. *Id.* They are more likely to be "political hermaphrodites," supporting both parties. *Id.* There is simply no valid reason to believe that corporate entities would be coerced into any particular political position. Given the variety of public contracts and the entities that compete for them, a per se rule like the rule

adopted in *Rutan* based on assumptions about the "typical" independent contractor is not justified or defensible.

CONCLUSION

For the foregoing reasons, the State Officials respectfully submit that the judgment of the United States Court of Appeals for the Seventh Circuit should be affirmed.

RESPECTFULLY SUBMITTED,

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